88-1764

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Supreme Court, U.S.
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In The

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989
No. 88-1756

MONTE LEE POST,

Petitioner,

v.

LUIS GARCIA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I

Whether petitioner has exhausted his state remedies when his state Petition for Writ of Habeas Corpus alleged only violations of state law while his Federal Petition for Writ of Habeas Corpus raised federal questions.

II

Whether petitioner's Motion to Recall the Remittitur, which was denied by the California Court of Appeal without citation and later denied on a Petition for Review to the California Supreme Court without citation exhausted his federal contentions where, because the Motion to Recall the Remittitur was not the proper vehicle for raising his contentions as the state courts would normally deny the motion for procedural reasons.

III

Whether the available state remedies requirement of the exhaustion doctrine mandates that state remedies must not only be available through the District Court proceedings but must remain available throughout subsequent federal appellate proceedings.

IV

Whether, where a petitioner instead of exhausting his available state remedies, which remain available after a district court judgment setting forth his remedies, waives his right to raise his contentions when he fails to follow the instructions to properly exhaust his remedies but instead proceeds with an appeal to the Ninth Circuit during which period he loses his state remedies.

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OPINIONS BELOW

The unpublished memorandum affirming the District Court's ruling appears as Appendix A in the Petition for Writ of Certiorari. The order of the Ninth Circuit Court of Appeals denying petitioner's Petition for Rehearing and Suggestion for Rehearing en banc, filed on December 30, 1988 appears as Appendix B in the Petition for Writ of Certiorari.

The judgment of the United States District Court for the Central District of California denying the Petition for Writ of Habeas Corpus without prejudice and the memorandum in support thereof, appears as Appendix A, herein.

JURISDICTION

On December 30, 1988,petitioner's Petition for Rehearing and suggestion for rehearing en banc was denied by the Ninth

Circuit Court of Appeal. (Petn. for Writ of Certiorari, Appendix B, p. 51.) This Court filed petitioner's Petition for Writ of Certiorari on March 27, 1989. Since the petition was filed within 90 days of a subject order of the Ninth Circuit, the petition was filed timely. (28 U.S.C. 2101(c).)

Jurisdiction is apparently invoked pursuant to section 1254(a) of Title 28 of the United States Code.

STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney, appellant was charged in count I with attempted murder in violation of California Penal Code sections 667 and 187 and in count II with assault by means of force likely to produce great bodily injury and with a deadly weapon in

violation of California Penal Code section 245(a). The victim in both counts was appellant's estranged wife. Both counts contained a personal use allegation alleging that petitioner personally used a firearm, to wit, a pistol, within the meaning of California Penal Code sections 12022.5 and 1203.06(a)(1). Following a trial by jury, petitioner was found guilty of assault by means of force likely to produce great bodily and with a deadly weapon as charged in count II of the information. The jury further found true the use allegation. The jury announced it was hopelessly deadlocked as to count I and the trial court declared a mistrial as to count I only. Probation was denied and petitioner was sentenced to state prison for a total term of five years. (Clerk's Record from the Federal Docket sheet,

referred to by the Ninth Circuit and hereinafter as CR, CR 5, P. 10)

The California Court of Appeal, Second Appellate District, Division Five, affirmed the judgment. (CR 5, p. 11.) Petitioner filed a Petition for Review from the Court of Appeal judgment in the California Supreme Court. (CR 5, p. 29.) The California Supreme Court denied the Petition without citation. (CR p. 4.)

Petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court. (CR 5, p. 52.) The California Supreme Court denied the Petition for Writ of Habeas Corpus. In the order denying the petition, the court cited In re Terry (1971) 4 Cal.3d 911, 917 and California Rules of Court, Rule 32, subdivision (b). (CR 5, p. 96.)

Petitioner filed a Petition for Writ

of Habeas Corpus in the United States District Court for the Central District of California. (CR 1.) An order to show cause was issued, directing respondent to file a Return to the Petition on the issue of exhaustion or if exhaustion is conceded, then on the merits. (CR 3) Respondent filed a return arguing only that the petition be dismissed because Petitioner failed to exhaust his state remedies. (CR 5.) Petitioner filed a traverse to Return of the Petition. (CR 6.) On January 20, 1987, the United States Magistrate filed his Report and Recommendation in which it was recommended that the petition be dismissed without prejudice to allow the filing of a new petition once state remedies have been fully exhausted by fairly presenting the federal issues to the highest court of the

State of California. (Appena. A;CR 8.) Petitioner filed objections to the Magistrate's Report and Recommendation. (CR 9 and 10.) Having read Petitioner's objections, the Magistrate did not change his recommendation that the Petition be dismissed. (App. A; CR 11.) United States District Court Judge Robert M. Takasugi concurred with and adopted the findings and conclusions of the Magistrate. (CR 13)

The District Court, pursuant to Title 28, section 2253 of the United States Code and Federal Rules of Appellate Procedure 22(b), ordered that the certificate of probable cause be denied. (CR 15.) On May 14, 1987, Petitioner requested the United States Court of Appeal for the Ninth Circuit to issue a certificate of probable cause. On July 7, 1987, the

Court of Appeal for the Ninth Circuit issued a certificate of probable cause, thereby conferring jurisdiction pursuant to Title 28, section 2253 of the United States Code. (CR 18.)

While his appeal was pending in the Ninth Circuit Court of Appeals, petitioner submitted an application to the California Court of Appeal to recall the remittitur. (Motion to Recall Remittitur; Memorandum of Points and Authorities, *People* v. *Post*, No. 2D Crim. 43254 (Apr. 6, 1987), 3 CR., Exh. X; see also Pet. for Writ of Cert., App. A, pp 44-45.) After the Court of Appeal denied this application without an opinion, petitioner petitioned to the California Supreme Court to review the denial. The Petition for review was denied without an opinion. (Pet. for Writ of Cert., App.C.) Petitioner also filed a

state Petition for Writ of Habeas Corpus in the Superior Court of California. The Superior court denied the petition without hearing. Petitioner did not seek review of this petition. (see, Pet for Writ of Cert., App. A, pp. 42-43, fn.1.)

On October 4, 1988, following submission of the briefs and oral argument, the Ninth Circuit issued a memorandum, not for publication, affirming the District Court's dismissal of petitioner's Petition for Writ of Habeas Corpus, without prejudice, until petitioner has exhausted his available state remedies. (Pet. for Writ of Cert., App. A.)

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied for several reasons. The District Court and the Ninth Circuit Courts of Appeal properly found that petitioner's contentions in the state courts alleged misapplication of state law and violations of the state constitution and thus the federal claims petitioner now attempts to assert in his federal petition were never fairly presented to the California Courts. The Ninth Circuit Court of Appeals, in an unpublished memorandum, properly found that petitioner's Motion to Recall the Remittitur filed in the state courts while his appeal in the Ninth Circuit was pending, did not exhaust his available state remedies. The Ninth Circuit, relying on its previous opinion in *Hayward*

v. *Stone*, 496 F.2d 844, 846 (9th Cir. 1974) properly found that a denial without opinion of an application to recall the remittitur in California is generally a denial on procedural grounds that the incorrect remedy was sought and thus the exhaustion requirement has not been met.

At the time petitioner filed his Petition for Writ of Habeas Corpus in the District Court and at the time the District Court denied, without prejudice, this Petition, petitioner did have an available state remedy, in that, he was still in state custody and could have filed a state Petition for Writ of Habeas Corpus alleging his federal contentions. Petitioner was specifically instructed by the District Court and by respondents in the Return that he had an available state remedy by way of state Petition for Writ

of Habeas Corpus. (App. A; CR 5.)

However, petitioner did not follow the instructions of the District Court and instead chose to exhaust his remedies by way of a Motion to Recall the Remittitur. As noted earlier, a denial of a Motion to Recall the Remittitur without citation is a denial on procedural grounds and the exhaustion requirements have not been met.

Petitioner cannot be heard to complain that he has no available state remedies because he is no longer in state custody when it has been his own actions which caused the unavailability of state remedies. The District Court properly found, and the evidence demonstrates, petitioner knew as early as 1983, three years prior to the filing of his federal petition in District Court, of the federal contentions he sought to raise. (App. A)

The three year delay can only be attributable to petitioner's inactions.

Petitioner cannot contend the exhaustion requirements have been met because he no longer has available state remedies when his intentional actions and inactions caused the remedy to be unavailable. Thus, there are no extraordinary circumstances to excuse the exhaustion requirements.

The unpublished memorandum of the Ninth Circuit does not create new law nor does it seek to resolve a conflict within the circuit. Furthermore, contrary to petitioner's assertions, capacity to commit a crime is not an element of the crime that appellant was found guilty. As such, petitioner has failed to state a federal question which would entitle him to habeas corpus relief. The Petition for

Writ of Certiorari should be denied.

ARGUMENT

I

PETITIONER HAS FAILED TO EXHAUST HIS STATE REMEDIES, THE PETITION WAS PROPERLY DISMISSED

A. Petitioner has failed to present his federal contentions to the state's highest court

In order to exhaust state remedies the legal and factual bases of the federal contentions must have been presented to the state's highest court. (*Anderson* v. *Harless*, 459 U.S. 4, 7-8, 103 S.Ct. 276, 277-278, 74 L.Ed.2d 3, 7-8 (1982).) Moreover, in order to obtain a decision on the merits of any of his federal contentions, petitioner must have fairly presented each of his federal contentions to the state's highest court. (*Rose* v. *Lundy* 455 U.S. 509, 522, 102 S.Ct. 1198,

1205, 71 L.Ed.2d 379, 390 (1982).)

The contention raised in the Petition for Writ of Habeas Corpus in the California Supreme Court differs from the federal contention petitioner now claims. (See CR 5, p. 52.) In petitioner's Writ of Habeas Corpus to the California Supreme Court he contended that under California law the trial court erroneously failed to give sua sponte an instruction on involuntary intoxication and erroneously refused to give this instruction when requested. Petitioner asserted that the evidence warranted the instruction and the trial court erred in failing to give the instructions. Petitioner cited to no federal due process violation in his Petition for Habeas Corpus to the California Supreme Court. (See CR 5, pp. 56-57,78-88.)

In his petition to the District Court, petitioner contended for the first time that the trial court had no discretion to look at the evidence and determine if the requested instruction should in fact have been given. (CR 1, pp. 4-5, 7.) The California Constitution, Article VI, section 10 and California Penal Code section 1127 grants the trial court the authority to make the exercise of discretion now challenged. The contention in the federal writ attacked for the first time the authority of the trial court to even determine if the evidence warranted the requested instruction. This is vastly different from the previous argument to the California Supreme Court in his Petition for Writ of Habeas Corpus which necessarily conceded the trial court's

discretionary authority under state law to determine if the evidence warranted the requested instruction in arguing that the court abused its discretion in not giving the requseted instuction. The California state courts should be given the first opportunity to interpret its' state constitutional provisions and state statues.

Petitioner contended in his writ to the District Court that the trial court's refusal to charge the jury with the requested jury instruction on involuntary intoxication relieved the prosecution of its burden of proving petitioner's capacity to commit the crimes alleged. Petitioner argued for the first time that capacity was an element of the crime charged and the people had the burden of proving it. Therefore, the trial court's

refusal to give the requested jury instructions violated federal due process because it unconstitutionally relieved the prosecution of its burden of proving every element of the offense beyond a reasonable doubt, including the capacity to commit the offense. (CR 1, pp. 2-4.) This federal contention was never raised in the Petition for Habeas Corpus to the California Supreme Court.

Petitioner argued in the state court that the errors were prejudicial because they deprived him of a complete defense to the charges, not that the error impermissibly shifted the burden to petitioner to prove an element of the crime, as he argued in his federal petition. (CR 5, p. 87-88.) Moreover, under California law, capacity has been found not to be an element of a crime, but

an affirmative defense which the defendant has the burden of proving. (*People* v. *Boyes*, 149 Cal.App.3d 812, 817-821, 197 Cal.Rptr. 105 (1983).) This federal contention is clearly a separate issue from that raised in the state courts. (*Engle* v. *Isaac*, 456 U.S. 107, 120, 102 S.Ct. 1558, 1568-1569, 71 L.Ed.2d 783 (1982).)

Thus, under *Anderson* v. *Harless*, *supra*, 459 U.S. 4, 7-8, 103 S.Ct. 276, 277-278, there is a clear failure to exhaust state remedies in that the federal bases of the contention presented to the federal court was not raised in the state courts. (see also, *Picard* v. *Connor*, 404 U.S. 270, 276, 92 S.Ct. 509, 512-513, 30 L.Ed.2d 438, 444 (1971).)

In addition, where there is a federal decision subsequent to the petitioner's

application for relief in the state courts, and such decision changes the law, the petitioner must afford the state courts the opportunity to determine the subject issue in light of the change in federal law. (*Picard* v. *Connor*, 404 U.S. 270, 276, 92 S.Ct. 509, 512-513, 30 L.Ed.2d 438, 444 (1971). ; *Blair* v. *People of the State of California*, 340 F.2d 741, 745 (9th Cir. 1965).)

In the present case, this court's decision in *Rose* v. *Clark* 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), explaining and establishing the standard of error for when a jury was not instructed on an element of a crime, was issued after petitioner filed his state papers. (see also, *People* v. *Lee*, 43 Cal. 3d 666, 671-674, __ Cal. Rptr. __ (1987).)

Assuming arguendo, the trial court's failure to give the contended jury instructions resulted in the improper shifting of the burden of proof to the accused by presuming capacity, then the California courts should have an opportunity to not only review this issue, but review the issue in light of *Rose* v. *Clark* 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).

B. The Court Of Appeals, Ninth Circuit, Correctly Found That Petitioner's Motion To Recall The Remittitur And His Petition For Review Of The Denial Of Remittitur Filed In The State Court Did Not Exhaust His State Remedies

When the District Court denied petitioner's Petition for Writ of Habeas

Corpus, without prejudice, it instructed petitioner that he still had a remedy in the California Courts by way of a state Petition for Writ of Habeas Corpus. (App. A.)

Respondents set forth in the Return in the District Court (CR 5) that petitioner had a viable state remedy in that state courts would have entertained a Petition for Writ of Habeas Corpus on the issue of whether petitioner could obtain relief from the federal courts. (*In re Domingo* 268 Cal.App.2d 642, 648, 74 Cal.Rptr. 161 (1969).) Also the issue of whether fundamental constitutional rights have been violated would have been entertained by state courts in a Petition for Writ of Habeas Corpus. (*People* v. *Sorenson* 111 Cal.App.2d 404, 405, 244 P.2d 734 (1952); see also *In re Ali* 230

Cal.App.2d 585, 590, 41 Cal.Rptr. 108 (1964).)

While petitioner's appeal was pending in the Ninth Circuit, he filed a motion in the California Court of Appeal to recall the remittitur. An application of recall of Remittitur is a California post-conviction remedy allowing petitioner to request the Court of Appeal to re-assert its jurisdiction over his case. (See Cal. Rules of Court, rule 25(b).)

In his motion, petitioner alleged that he had been denied his federal constitutional rights to a trial by jury, to a fair trial and to effective assistance of counsel at both the trial and appellate level. (Motion to recall Remittitur; Memorandum of Points and Authorities, *People* v. *Post*, No. 2d Crim. 43254 (Apr. 6, 1987), 3 CR., Exh. X; Pet.

for Writ of Cert, App. A. p.45) After the Court of Appeal denied this application without an opinion, petitioner petitioned to the California Supreme Court to review the denial. This petition was also denied without an opinion or citation. (Pet. for Writ of Cert., App. C,p.53.)

In California a Motion to Recall the Remittitur is an extraordinary remedy wherein the judgment sought to be recalled is alleged to have been secured by fraud or imposition on the court and, generally, an error of law does not authorize the recalling of a Remittitur. (*People* v. *Randazzo*, 48 Cal.2d 484, 488, 310 P.2d 413 (1957); *People* v. *Mutch*, 4 Cal.3d 389, 396, 93 Cal.Rptr. 721 (1971).) An exception to the general rule however is made when the error is of such dimensions to entitle the defendant to a Petition for

Writ of Habeas Corpus and where ineffective representation on appeal precluded petitioner from the benefit of raising the issue(s). (See e.g. *People* v. *Mutch, surpa*, 4 Cal.3d at 396-395; *In re Martin*, 58 Cal.2d 133, 23 Cal.Rptr. 167 (1962); B. Witkin, *California Criminal Procedure*, § 735, p. 704 (1963).)

Thus the denial of the motion to recall the remittitur and the denial of the petition for review from the denial order of the California Court of Appeal does not satisfy the exhaustion requirement herein. (see, *Hayward* v. *Stone* 496 F.2d 844, 846 (9th Cir., 1974).)

The court in *Hayward* thoroughly sets forth the California proceeding relative to motions to recall the remittitur. (*Id.*) As can be seen from said case the only proper application of a Motion to

Recall the Remittitur is where it is contended that the failure to provide appellate counsel or to remedy inadequate appellate counsel and not errors of law as contended by petitioner in his Motion to Recall the Remittitur.

Therefore, unless specifically noted by the state court as a denial on the merits, a denial of the Remittitur without citation will be presumed a denial on procedural grounds that the incorrect remedy was sought.

Allegations alleging the prosecution was unconstitutionally relieved of proving beyond a reasonable doubt every element of the crime (*Rose* v. *Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)) and allegations alleging appellate counsel was ineffective (*Strickland* v. *Washington* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984).) are two separate issues and exhaustion of one cannot be presumed to be exhaustion of the other. (*Rose* v. *Lundy*, supra, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205; *Anderson* v. *Harless*, supra, 459 U.S. 4, 103 S.Ct. 276.)

The Ninth Circuit here properly ruled that the denial of Petitioner's Motion to Recall the Remittitur did not exhaust his state remedies with regards to his federal due process claim concerning the trial court's failure to give the requested jury instruction.

C. **At The Time Petitioner Filed His Petition For Writ Of Habeas Corpus In The District Court Petitioner Had Available State Remedies By Way Of State Petition For Writ Of Habeas Corpus**

Petitioner urges this Court to accept the Writ of Certiorari and excuse the exhaustion requirements because he no longer has an available state remedy becaues he was released from state custody on April 30, 1988. (Petn. for Writ of Certiorari, p. 17.) Respondent however, submits, that petitioner's failure to allege his federal contention to the state's highest court, was brought about by petitioner's own intentional delay and subsequent failure to follow proper procedure. Thus, petitioner waived his

right to exhaust in the state courts and cannot argue to be excused from the exhaustion requirements.

The requirement that a petitioner exhaust his remedies "available in the courts of the state," refers only to remedies still available in the courts at the time of the federal petition was originally filed. (*Engle* v. *Isaac*, 456 U.S. 107, 125, fn. 28, 102 S.Ct. 1588, 1570, fn. 28, 71 L.Ed.2d 783 (1982); *Fay* v. *Noia*, 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (1963).)

In its initial report and recommendation, the magistrate found that petitioner had not exhausted his federal claims in that his assertions in the state court, based upon California law and the California Constitution, failed to state any federal contention and as such

petitioner failed to exhaust his state remedies. (App. A) In his objections to the magistrate's report and recommendation, petitioner alleged that his failure to raise his federal contentions in the state court was due to the ineffective assistance of appellate counsel in refusing to raise the federal contentions. (Id., CR 9 & 10.)

In its final report and recommendation, the District Court noted that not only had petitioner not exhausted his available state remedies with regards to the ineffective assistance of appellate counsel claim, it further noted that appellant counsel could not be blamed for petitioner's failure to bring this issue to the state's highest court. The magistrate found that based upon the attachments to petitioner's own

objections, it appeared that petitioner had known of his federal contentions and the possible failure to raise these federal contentions in the state courts for at least three years (1983) prior to the filing of this ferderal petition. (App. A.)

Petitioner was instructed by the District Court that he still had an available state remedy in that he still may file a Petition for Writ of Habeas Corpus in the California Courts addressing his federal questions. Respondents, in our Return to Petition for Writ of Habeas Corpus and Memorandum of Points and Authorities in support thereof also noted that petitioner had a viable state remedy by way of state Petition for Writ of Habeas Corpus to redress his federal contentions. (*In re Domingo, supra*, 268

Cal.App.2d 642, 648, 47 Cal.Rptr. 161; *In re Ali*, *supra*, 230 Cal.App.2d 585, 590, 41 Cal.Rptr. 108; *People* v. *Sorensen*, *supra*, 111 Cal.App.2d 404, 405, 244 P.2d 734.)

Instead of filing a state Petition for Writ of Habeas Corpus, as instructed by the District Court, petitioner sought to exhaust his remedies by way of Motion to Recall the Remittitur. As shown earlier, the case law is very clear that this was an ineffective way of exhausting his federal claims on the merits in state court.

By filing a Motion to Recall the Remittitur and attempting to exhaust his rememdies petitioner impliedly acknowledged the correctness of the District Court's ruling that he had not exhausted his available state remedies.

This Court in *Engle* v. *Isaac*, *supra*, 456 U.S. 107, 128, 102 S.Ct. 1558, 1572, held that any state prisoner bringing a constitutional claim to the federal courts after a state procedural default must demonstrate cause and actual prejudice before obtaining relief. (See also *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).)

As shown by his Motion to Recall the Remittitur, petitioner had ample opportunity to file a state Petition for Writ of Habeas Corpus in the California Supreme Court, thereby exhausting his state remedies, before he was released from state custody and procedurally barred by the state from filing such a petition. Petitioner here was the "cause" of the procedural default and thus has waived exhaustion and cannot be granted relief

from the exhaustion requirements. (*Engle* v. *Isaac*, *supra*, 456 U.S. at 129, 102 S.Ct. at 1572-3; *Fay* v. *Noai*, *supra*, 372 U.S. 391, 438-439, 83 S.Ct. 822, 848-849.)

Furthermore, as the District Court properly noted, appellant had known for three years about the desire to raise his federal contentions and the need to raise them in state court and did not act upon them. The lapse of time can only be attributed to petitioner's own inaction. If petitioner had acted earlier in raising his federal contentions in the state courts he would have had ample opportunity to exhaust his state remedies before he was procedurally barred.

It has been petitioner's intentional inactions and actions which has "caused" him to be procedurally barred by the state courts from filing a Petition

for Writ of Habeas Corpus thereby exhausting his state remedies. At the time petitioner filed his Federal Writ of Habeas Corpus in the District Court and at the time the District Court denied the writ without prejudice, petitioner had available state remedies. Because petitioner's inability to exhaust his available state remedies was brought about by his own intentional inactions and actions and thus is the cause of the state procedural default, he cannot be heard to complain on appeal that this Court hear his Petition for Writ of Habeas Corpus because he no longer has any available state remedies. (*Engle* v. *Isaac*, *supra*, 456 U.S. at 129, 102 S.Ct. at 1572; *Fay* v. *Noai*, *supra*, 372 U.S. 391, 438-439, 83 S.Ct. 822, 848-849.)

II

REVIEW BY THIS COURT IS UNNECESSARY AS PETITIONER HAS FAILED TO STATE A FEDERAL CONTENTION WHICH WOULD HAVE ENTITLED HIM TO FEDERAL HABEAS CORPUS RELIEF

Petitioner argued in his Petition for Writ of Habeas Corpus in the United States District Court that the trial court's refusal to instruct on unconsciousness/involuntary intoxication removed a material issue of fact from the jury's consideration thereby violating petitioner's right to a jury trial under both the California and United States Constitutions. In support of this claim, petitioner argued that the trial court's refusal to give a requested jury instruction relieved the prosecution of its burden of proving every element of the offense beyond a reasonable doubt, that being capacity, thus violating

petitioner's right to due process. (CR 1, p. 32.)

Petitioner's due process argument fails in that consciousness is not an element of the crimes he was charged with or found guilty of. (*People* v. *Boyes*, 149 Cal.App.3d 814, 197 Cal.Rptr. 105 (1983).) Under federal, like California, unconsciousness due to involuntary intoxication is not an element of the crime charged but an affirmative defense. (*United States* v. *F.D.L.*, 836 F.2d 1113, 1116-1117 (9th Cir. 1988); *United States* v. *Henderson*, 680 F.2d 659 (9th Cir. 1982).)

The state possesses the primary authority for defining its laws and enforcing its criminal laws. (*Engle* v. *Isaac*, *supra*, 456 U.S. 107, 128, 102 S.Ct. 1558, 71 L.Ed.2d 793 (1982); *Jackson* v.

Virginia 433 U.S. 307, 324, fn.16, 99 S.Ct. 2781, 2792, fn.16, 61 L.Ed.2d 560 (1979).) Because consciousness was not an element of the crime, the People had no burden of proving it, thus petitioner was not deprived of his due process rights under the federal constitution. (*Engle* v. *Isaac, supra*, 456 U.S. 107, 120, 102 S.Ct. 1558, 1567; *Patterson* v. *New York*, 432 U.S. 197, 212, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977); *Gilcrist* v. *Kincheloe*, 589 F.Supp. 291 (E.D. WA.1984), affirmed 774 F.2d 1173 (9th Cir. 1985); *People* v. *Boyes, supra*, 149 Cal.App.3d 814.)

Because petitioner has not raised a federal question, this Court need not even reach the exhaustion and waiver issues.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

DATED: July 12, 1989

Respectfully Submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MONTE LEE POST, Petitioner, v. LUIS GARCIA, Respondent.	CASE NO. CV86-7547 RMT (RWR) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Final Report and Recommendation and the attached Report and Recommendation are submitted pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On January 20, 1987, the Clerk filed Notice of Filing of Magistrate's Report and Recommendation and the Lodging of Proposed Judgment, which was served on the parties together with copies of the said

Report and Recommendation.

Petitioner has timely filed his Objections to the Report and Recommendation. The Magistrate has carefully read and considered Petitioner's Objections, but he is not persuaded to modify his recommendation in any respect. Petitioner's Objections allege, in essence, that he should be excused from the exhaustion requirement (1) on the grounds that his California appointed attorney was incompetent and (2) that the California Court of Appeals and Supreme Court should have know, sua sponte, that his argument addressed a federal constitutional question when, in actuality, it only addressed an interpretation of California law. Petitioner's Objections are wholly without merit. Not only has he misperceived the

thrust of the Report and Recommendation concerning a full and fair presentation of his federal contentions to the state courts, but his present posture of claiming the reason for not complying with the exhaustion requirement was due to ineffective appellate counsel also misses the point since he has not exhausted that contention in the state system. Petitioner's remaining allegation is that, if he were required to return to the state system to exhaust his state remedies, he will probably be released before the exhaustion requirement can be satisfied and the petition would be moot. This argument is no justification for waiving the exhaustion requirement, as it applies to Petitioner in this particular situation. From a review of the attachments to Petitioner's Objections, it

appears that he has known of the possible failure to raise these federal contentions for at least three years. All of the issues set forth in Petitioner's Objections have been more than adequately addressed in the original Report and Recommendation. The issues presented by petitioner have been, and must be, decided adversely to him.

IT IS THEREFORE THE FINAL RECOMMENDATION OF THE MAGISTRATE that an Order be issued by the Court (1) approving these Reports and Recommendations, and (2) directing that Judgment be entered dismissing the Petition without prejudice to the filing of a new Petition once state remedies have been fully exhausted by fairly presenting the federal issues to the highest court of the State of California.

Dated: February 27, 1987

/S/
RONALD W. ROSE
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MONTE LEE POST, Petitioner, v. LUIS GARCIA, Respondent.	CASE NO. CV86-7547 RMT (RWR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Report and Recommendation is submitted pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

Petitioner, pro se but paying the filing fee, commenced this action on November 19, 1986 by filing a Petition for Writ of Habeas Corpus by a Person in State

Custody. A Return and Traverse have been timely filed. No evidentiary hearing has been conducted.

For reasons which will be discussed below, the Magistrate recommends dismissal of the Petition for failure to exhaust state remedies. Petitioner's contentions have been presented to the highest court of the State of California, but there has been a failure to fairly present the federal questions and have them resolved on the merits, in any state court proceeding. To sufficiently appreciate the failure of Petitioner to comply with the federal question exhaustion doctrine announced in Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982), it is necessary to compare Petitioner's present contentions, side-by-side with those allegedly similar

contentions presented on his direct appeal and in his petition for writ of habeas corpus before the California Supreme Court.

PETITIONER'S CONTENTIONS

1. (As presented herein) The trial court's refusal to instruct on unconsciousness/involuntary intoxication removed a material issue of fact from the jury's consideration, violating Petitioner's right to a jury trial under both the California and United States Constitutions.

CONTENTION AS PRESENTED TO THE CALIFORNIA SUPREME COURT ON PETITION FOR HEARING AFTER DENIAL OF HIS DIRECT APPEAL BY THE CALIFORNIA COURT OF APPEALS.

1. The trial court committed reversible error in refusing to instruct the jury on unconsciousness as a complete

defense. (Footnote one.)

PETITIONER'S CONTENTION AS PRESENTED TO THE CALIFORNIA SUPREME COURT IN HIS PETITION FOR WRIT OF HABEAS CORPUS.

1. Numerous reversible trial court errors which could have led to an acquittal (failure to send requested instructions). (Footnote two.)

> As a matter of comity, a federal court will not grant a state prisoner's petition for writ of habeas corpus unless it appears that the petitioner has exhausted available state remedies ... State remedies have not been exhausted unless the petitioner's federal claim has been `fairly presented to the state courts,' ... and the highest state court has disposed

of the claim on the merits ... (cites omitted). Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979).

In order to fairly present the federal contentions to the state's highest court the substance of the factual and legal bases of the federal contentions must have been presented to the state court. Anderson v. Harless, 459 U.S. 4, 6-8, 103 S.Ct. 276, 277-78, 74 L.Ed.2d 3 (1982); Allbee v. Cupp, 716 F.2d 635, 636-37 (9th Cir. 1983); Pappageorge v. Sumner, 688 F.2d 1294, 1295 (9th Cir. 1982), (Ely, J., concurring), cert. denied, 495 U.S. 1219, 103 S.Ct. 1223, 75 L.Ed.2d 459 (1983).

Although it is a settled rule, as advanced by Petitioner in his Traverse, that habeas petitioners do not have to

quote "book and verse on the federal Constitution", Picard v. Connor, 404 U.S. 270, 278, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971), to satisfy the federal question test, even a cursory analysis of the issue presented mandates the conclusion that his present efforts seek to establish a denial of due process in violation of the Fourteenth Amendment of the United States Constitution, when all of his state issues are directed toward errors committed by the state judge which were argued to be in violation of the California Constitution.

In this case, which is analogous to Picard v. Connor, supra, there can be no basis for an argument that a miscarriage of justice under California law is the equivalent of a violation of federal due process. See Picard v. Connor, 404 U.S.

at 278, 92 S.Ct. at 513.

> . . . [I] is not sufficient merely that the federal habeas applicant has been through the state courts. The rule [of exhaustion] would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. 404 U.S. at 275-276, 92 S.Ct. at 512.

Petitioner's arguments to the California Supreme Court were directed toward his perceived violations of the California State Constitution which deals with a miscarriage of justice. The judges of the state courts were never obligated to decide whether, in this case, a "miscarriage of justice" under California law was the equivalent of a due process

violation under the federal Constitution. Without a ruling by the California Supreme Court, either could be greater or lesser than the other. Comity dictates that his decision first be made by the California Supreme Court or that court at least have an opportunity to address this issue before denying it on the merits.

For the above reasons, the merits of the present application have not been reached. It appears that Petitioner may still file a petition for writ of habeas corpus in the California courts, clearly addressing his federal questions, as well as the perceived violation of jury instructions addressed in Rose v. Clark, __ U.S. __, 106 S.Ct. 3101, 92 L.Ed.2d 460 (19[86]).

The Magistrate finds that by reason of the foregoing, and pursuant to 28

U.S.C. Section 2243, Petitioner is not now entitled to writ of habeas corpus from this Court.

IT IS THEREFORE RECOMMENDED that an Order be issued by the Court (1) approving and adopting this Report and Recommendation and (2) dismissing the Petition without prejudice to the filing of a new Petition once state remedies have been fully exhausted by fairly presenting the federal issues to the highest court of the State of California.

Dated: January 20, 1987

/S/
RONALD W. ROSE
UNITED STATES MAGISTRATE

FOOTNOTES

1. In Petitioner's Points and Authorities for rehearing before the California Supreme Court, he relied solely on the California Penal Code, California case authority and the California Constitution, Article VI, Section 4 1/2, 13.

2. Again, the only authority cited in Petitioner's brief before the California Supreme Court were California case authority and the California Constitution.

DECLARATION OF SERVICE BY MAIL

I, JOSEPHINE D. ROSE, declare that I am over 18 years of age, and not a party to the within cause; my business adress is 3580 Wilshire Boulevard, Los Angeles, California 90010; I served a copy of the attached **RESPONDENT'S BRIEF IN OPPOSITION** on each of the following, by placing same in an envelope addressed as follows:

Three copies to:
Monte Lee Post
P.O. Box 2122
Cathedral City, CA

One Copy to:
United States Court of Appeals
7th and Mission Streets
San Francisco, CA 94101

United States District Court
312 N. Spring Street
Los Angeles, CA 90012

Each said envelope was then, on JUL 1 2 1989 sealed and deposited in the United States Mail at Los Angeles, alifornia, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JUL 1 2 1989 at Los Angeles, California

CDF:rm

JOSEPHINE D. ROSE
DECLARANT